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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1971

No. ~~1839~~ 70-294

THE CITY OF LOS ANGELES,
a municipal corporation,

Petitioner,

vs.

SHELL OIL COMPANY,
a corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

ROGER ARNEBERGH,
City Attorney,
JAMES A. DOHERTY,
Assistant City Attorney,
THOMAS C. BONAVENTURA,
Assistant City Attorney,
LAWRENCE M. REMES,
Deputy City Attorney,

Attorneys for Petitioner,
The City of Los Angeles.

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The petitioner, The City of Los Angeles, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in these proceedings on February 22, 1971.

OPINION BELOW

The opinion of the California Supreme Court rendered on petitioner's appeal is reported in 4 Cal. 3rd 108. A copy of the opinion is attached to this petition as Exhibit "A" of the Appendix to the petition.

JURISDICTION TO REVIEW

The opinion of the Supreme Court of the State of California was filed and entered on February 22, 1971. On March 9, 1971 petitioner filed its Petition for Rehearing which was denied on March 26, 1971. This petition for certiorari was filed less than 90 days from March 26, 1971. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the California Supreme Court's holding that a local government must look beyond the contacts and interests of the taxpayer with the taxing jurisdiction in determining the measure of its tax conflict with the United States Supreme Court's holdings in

General Motors Corp. v. Washington (1964), 377 U.S. 436, 449, 12 L.Ed.2d 430, 84 S. Ct. 1564, and Norton Co. v. Department of Revenue (1951), 340 U.S. 534, 95 L.Ed. 517, 71 S. Ct. 377?

2. Where the trial court has found that the taxpayer's contacts and interests with the City of Los Angeles, relative to selling activities which generated gross receipts used to measure its tax, were substantial enough to justify a tax measured by 100% of those gross receipts, does the California Supreme Court's holding that the City must apportion its tax to reflect extraterritorial activities of the taxpayer, which contributed to the tax measure, violate the City's right to due process of law under the Fourteenth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of the United States, Amendment Fourteen:

> "No State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

The City, under its business license tax ordinance, taxed Shell Oil Company's Los Angeles business activities, not its sales, and measured this tax by gross receipts which were, indisputably, tied to those business activities. Shell maintained extensive contacts and interests with Los Angeles, and the City measured its tax by 100% of Shell's gross receipts from wholesale sales toward which end its business activities in Los Angeles were directed. Extraterritorial activities also contributed to producing gross receipts, but the record contains no evidence that any other jurisdiction taxed gross receipts from wholesale sales.

The Superior Court's Findings of Fact (C. T. pp. 38, 39) state that Shell maintained a district office in the City of Los Angeles which assisted in locating new station sites and acted as a servicing agent. It also maintained a division office at 1008 West Sixth Street, Los Angeles, known as the Los Angeles Marketing Division of Shell Oil Company from which it exercised executive, budgeting, supervisory, and administrative control over the Los Angeles district office as well as other area district offices. The operations, treasury, and sales departments of the Marketing division were, in turn, broken down into various sub-departments which performed various functions all of which contributed to the receipts from wholesale sales to out-of-city

customers. Other departments located at the division headquarters, which were not part of the Marketing Division organization, also performed functions in cooperation with Marketing which contributed to the production of such receipts.

With respect to the Bulk Terminal sales, the following sales activities normally took place within the City of Los Angeles:

1. The activities at the Sixth Street Division Office in the City of Los Angeles were designed, at least in so far as the marketing division was concerned, to promote, stimulate or otherwise encourage the sale of Shell's goods or merchandise.

2. The bulk plant located in the City of Los Angeles had the merchandise for delivery to the Shell dealer.

3. The Shell dealer (except possibly for his first few orders) called the bulk plant in the City of Los Angeles on the telephone and placed his order there. He reversed the charges so that Shell paid for these calls when they were long distance calls.

4. The bulk plant in the City of Los Angeles processed the orders called in on the telephone.

5. The bulk plant in the City of Los Angeles approved or accepted the orders received.

6. The Sixth Street Division Office in the City of Los Angeles billed the dealer for the merchandise sold.

7. The Sixth Street Division Office received and collected the receipts resulting from the sale. In those instances where the Shell dealer was on a C.O.D. basis the tank truck driver picked up the payments at the time of delivery..

The fundamental controlling issue at all stages of this case has been whether, in light of Shell Oil Company's extensive business activities in the City of Los Angeles, which were related to but not totally responsible for the gross receipts used to measure its tax, the City had to apportion the tax to reflect extra-territorial activities which also contributed to generating these gross receipts.

The California Supreme Court's decision on this issue is contradictory to existing federal case law in an area where it is more difficult to justify such a decision at the local level, due to the nonexistence of local commerce clauses, than it would be at the federal level.

Reasoning that,
" . . . the problems of interstate commerce apply in microcosm to the problems of intrastate or intercity commerce . . . " (Sup. Ct. 's Opinion, p.A-18) and that " . . . in spite of the absence of a specific 'commerce clause'

in the state constitution, certain other provisions of the state and federal constitutions forbid municipal taxation which, by encouraging multiple burdens through the levy of unapportioned or improperly apportioned taxes on intercity business, operates to place such business at a competitive disadvantage." (Sup. Ct.'s Opinion, p. A-18).

The California Supreme Court erroneously concluded:

> "We here determine only that if there are substantial out-of-city sales activities which directly contribute to the gross receipts sought to be made a basis of the tax, the measure of tax must apportion those gross receipts in a manner which fairly reflects the proportion of in-city to out-of-city activities." (Sup. Ct.'s Opinion, pp. A-34, n. 17). [emphasis added]).

The state constitutional grounds utilized by the California Supreme Court as a subterfuge to enable it to apply Commerce Clause concepts to intra-state municipal taxation were stretched and distorted in an effort to accomplish that purpose and do not adequately support the Court's decision. Patently, former Article XI, Sec. 11 (now Article XI, Sec. 7) of the California Constitution, which provides that, "any county, city, town or township may

make and enforce within its limits all such . . . regulations that are not in conflict with general laws;" and Article IV, Sec. 16 of the California Constitution which provides that, "a local or special statute is invalid in any case if a general statute can be made applicable.", do not support the Court's holding that the City must look beyond its own contacts and interests with the taxpayer in determining the measure of its tax.

As to the remaining state constitutional ground relied upon by the California Supreme Court in its opinion (Sup. Ct. Opinion, p. A-20 n. 8), Article 1, Sec. 21 of the California Constitution, which provides in relevant part:

> " . . . nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all other citizens."

suffice it to say that there has been no issue raised as to the City's fair and impartial application of its ordinance to all persons conducting business within its jurisdiction.

The only relevant constitutional provision relied upon by the Court in support of its conclusion is the Equal Protection Clause of the Federal Constitution (Sup. Ct. Opinion, p. A-20 n. 8), and this would have to be stretched to accommodate the argument that taxpayers conducting extraterritorial activities are deprived of equal protection of the law because they may

be subjected to multiple taxation. 1/ The record is devoid of any showing that any portion of the gross receipts used to measure Shell's tax were the measure of a tax imposed by any other jurisdiction. In General Motors Corp. v. Washington (1964), 377 U.S. 436, 449, 12 L.Ed.2d 430, 84 S. Ct. 1564, to the contrary, there was evidence that St. Louis imposed a license tax measured by sales before shipment. Nonetheless, relying upon Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 3 L.Ed.2d 421, 79 S. Ct. 357, the United States Supreme Court rejected the argument that multiple taxation barred Washington's right to measure its tax by 100% of gross receipts from sales, stating:

> ". . . in Northwestern States Portland Cement Co. v. Minnesota, supra, 358 U.S. at 463, 3 L. ed. 2d at 430, we held that '[i]n this type of case the taxpayers must show that the formula places a burden upon interstate commerce in a constitutional sense. Appellant has not done this. It has not demonstrated what definite burden, in a constitutional sense, the St. Louis tax places on the identical interstate shipments by which Washington measures its tax. Cf.

1/ This argument was rejected by the California Supreme Court in Carnation Co. v. City of Los Angeles (1966), 65 Cal. 2d 36, 40.

International Harvester Co. v. Evatt, 329 U.S. 416, 421, 423, 91 L.Ed. 390, 394, 395, 67 S. Ct. 444 (1947). And further, it has not been shown that Oregon levies any tax on appellant's activity bearing on Washington sales. In such cases we have refrained from passing on the question of "multiple taxation", e.g., Northwestern States Portland Cement Co. v. Minnesota, supra, and we adhere to that position.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is In Direct Conflict With the Decisions of the United States Supreme Court in General Motors Corp. v. Washington and Norton Co. v. Department of Revenue.

The California Supreme Court, below, held:

> "We here determine only that if there are substantial out-of-city sales activities which directly contribute to the gross receipts sought to be made a basis of the tax, the measure of tax must apportion those gross receipts in a manner which

fairly reflects the proportion of in-city to out-of-city activities." (Sup. Ct. Opinion, pp. A-34, n. 17) [emphasis added]).

This statement represents the total significance of the Shell case and is a catastrophic departure from existing law.

In General Motors Corp. v. Washington, supra, the most recent United States Supreme Court pronouncement on the factual pattern presented by the case at bar, the Court held that a tax on the privilege of engaging in the business of selling measured by 100% of the gross receipts from sales, where substantial selling activities relative to those sales occurred within and without the taxing jurisdiction, was constitutionally valid in that it was levied on the incident of a substantial local business in the taxing jurisdiction.

"The question", said the Court, "is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the state has afforded. Where, as in the instant case, the taxing state is not the domiciliary state, we look to the taxpayer's business activities within the state, i.e., the local incidents, to determine if the gross receipts from the sales therein may be fairly

related to those activities." (emphasis added).

There is no gainsaying the point that the United States Supreme Court concerned itself solely with whether General Motors' contacts and interests with the taxing jurisdiction, relative to selling activities which generated the gross receipts used to measure the tax, were substantial enough to justify a tax on 100% of those gross receipts. The Court espoused this position in the light of substantial extra-territorial elements which contributed to the production of the gross receipts, to wit: manufacture of the products sold outside the taxing jurisdiction; administration and promotion of sales activity from outside the taxing jurisdiction; supervision of the capital structure and financing of the dealers from outside the taxing jurisdiction; responsibility for the adequacy of dealer services to customers from outside the taxing jurisdiction; and warehousing and shipment of parts from outside the taxing jurisdiction.

The position of the General Motors Court was a logical outgrowth of its decision, fourteen years earlier, in Norton Co. v. Department of Revenue (1951), 340 U.S. 534, 95 L. Ed. 517, 71 S. Ct. 377, wherein the Court upheld an occupation tax measured by unapportioned gross receipts from retail sales upon the business activity of receiving and forwarding orders to an out-of-state manufacturer; accepting delivery of the products, in many but not all cases, in carload lots; and

reconsigning separate orders in their original packages to customers. Norton involved substantial out-of-state contacts, including manufacturing outside the taxing jurisdiction; maintenance outside the taxing jurisdiction of general management, accounting, and credit offices, which performed activities relative to the sales; and the acceptance or rejection of all orders outside the taxing jurisdiction. However, in Norton as in General Motors, the United States Supreme Court looked only to the contacts and interests of the taxpayer within the taxing jurisdiction relative to the subject gross receipts in determining the validity of the tax.

The business activities of Shell Oil Company in the City of Los Angeles, as set forth, supra, had at least as much impact on sales generating gross receipts used to measure Shell's tax as did the local business activities of General Motors Corp. and Norton Co. on sales generating gross receipts in those cases. Defendants below did not deny this but dredged up the sophistry that General Motors and Norton apply only to sales taking place inside the territorial limits of the taxing jurisdiction. This argument is completely misleading, because the tax in the instant case, as in General Motors, 377 U.S. at 438, and Norton, 340 U.S. at 535, is imposed upon the privilege of engaging in business activities and not upon sales. Consequently, in the context of the issue before this Court, the "place at which the sale takes place", whatever this phrase

means, 2/ is only relevant to the extent that it constitutes a business activity. (American Manufacturing Co. v. St. Louis (1919), 250 U.S. 459, 63 L.Ed. 1084, 39 S. Ct. 522.)

2. The Decision Below Violates the City's Right to Due Process of Law and in So Doing Opens the Floodgates to Fraudulent Tax Reporting, Progagates Uncertainty, and Reduces Municipal Power to Tax While it Increases the Cost of Tax Enforcement

No United States Supreme Court or California Supreme Court case has ever before held that a municipality imposing a privilege tax measured by gross receipts must look beyond its own contacts and interests with the taxpayer when measuring its tax. This holding by the California Supreme Court, below, divests the City of Los Angeles of its right to

2/ In Norton Co. v. Department of Revenue, 340 U.S. at 535, title to most of the goods sold in connection with Norton's taxable business activity passed outside the taxing jurisdiction.

tax without due process of law. 3/ It is unreasonable to permit a multi-city business to escape paying its fair share of local taxes, commensurate with the extent and nature of its activities in the taxing jurisdiction, solely because it conducts business activities outside the taxing jurisdiction. The trial court found that Shell's business activities in the City of Los Angeles were substantial enough to justify a tax based on 100% of gross receipts from sales toward which end said business activities were directed (C. T. p. 81). The California Supreme Court's decision in the case at bar will require Los Angeles and every municipality in the State of California, which employs gross receipts as a tax measure, to apportion its tax where the taxpayer conducts

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3/ In Township of Riverdale v. Town of Orangetown (1968), 403 F. 2d. 684, 686, the court held: "We hold that a municipal corporation like any other corporation is a 'person' within the meaning of the Fourteen Amendment and is entitled to its protection." It is to be noted that the City of Los Angeles is a charter city, created by authority of former (Article 11, Sections 6 and 8, of the California Constitution (incorporated in 1970 into Article 11, Sections 3 and 5), and is neither a creature of the State nor subject to control by the State with respect to purely municipal affairs of which taxation is one. Ex Parte Braun (1903), 141 Cal. 204; City of Glendale v. Tronsden (1957), 48 Cal. 2d 93, 99.

"substantial" business activities outside the taxing jurisdiction regardless of the nature and extent of the taxpayer's business activities within the taxing jurisdiction.

This departure from what appeared to be the established law under General Motors Corp. v. Washington, supra, and Norton Co. v. Department of Revenue, supra, would, if permitted to stand, have a jarring effect upon municipal taxation. As most city business taxes are, perforce, self-reporting, the cities would be placed at the mercy of the taxpayers' judgment as to what constitutes an appropriate apportionment formula. Few, if any, cities could afford the extensive enforcement procedures which would be necessary to prevent grossly fraudulent reporting. State tax returns would be useless as a guideline to determining amounts owed. Every taxpayer who reported apportioning gross receipts would have to be audited. Each auditor would then have to devise an apportionment formula based upon the facts confronting him. There would be an inevitable increase in administrative hearings required to settle differences between auditors and taxpayers, and the City's ability to achieve uniform application of the tax would be diminished. The result of this erroneous decision would be to simultaneously divest municipalities of taxing power and increase the cost of tax enforcement.

CONCLUSION

No case has, heretofore, held that a municipality imposing a privilege tax measured by gross receipts must consider business activity occurring in other jurisdictions in determining the measure of its tax. The United States Supreme Court has specifically held to the contrary in General Motors Corp. v. Washington, supra, and in Norton Company v. Department of Revenue, supra, wherein the contacts and interests of the taxing jurisdiction with the business activity subject to tax were deemed the only relevant considerations in determining the sufficiency of the tax measure. The Los Angeles business activities of Shell in the instant case are as substantial and as related to the gross receipts utilized by the City to measure its tax as were the Washington business activities of General Motors and the Illinois business activities of Norton Company. It is difficult to conceive of a decision which could result in a more significant attenuation of municipal power to tax nor one fraught with more chaotic implications relative to tax enforcement than the decision below. Consequently, it is respectfully requested that a writ

of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

JAMES A. DOHERTY,
Assistant City Attorney,

THOMAS C. BONAVENTURA,
Assistant City Attorney,

LAWRENCE M. REMES,
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